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No. 98-1204

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In The

Supreme Court of the United States

October Term, 1998

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENTS IN REPLY

Responding to the arguments advanced by Respondent, G & G Fire Sprinklers, Inc., in its Opposition Brief, Petitioners respectfully submit:

1. The Ninth Circuit's Holding That Respondent Has a Property Interest In Amounts Purportedly Due For Work Performed on Public Works Projects Is In Conflict With This Court's Determination of What Constitutes a Property Interest Under the Due Process Clause.

After the petition for certiorari was filed, this Court decided *American Manufacturers Mutual Insurance Co. v. Sullivan*, 119 S.Ct. 977 (1999) (*"Sullivan"*), which squarely rejected the same theory of what constitutes a "property" interest for Due Process Clause purposes that the Ninth Circuit relied upon here. If the Court does not grant certiorari to hear this case itself, the Court should grant certiorari to vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Sullivan*.

In *Sullivan*, as the Court will recall, the plaintiffs contended that they had a "property" interest in workers' compensation benefits to pay for medical treatment. 119 S.Ct. at 989-990. The pertinent state statutes, however, provided that an employee was entitled only to "reasonable" and "necessary" medical treatment – and that "disputes over the reasonableness and necessity of particular treatment must be resolved *before* an employer's obligation to pay – and an employee's entitlement to benefits – arise." *Id.* at 990 (emphasis in original.) Consequently, the entire Court agreed that the plaintiffs did not have a

property interest in the benefits themselves *before* such dispute had been resolved. *Id.* at 990 (majority opinion); *id.* at 990-991 (Ginsburg, J., concurring); *id.* at 991 (Breyer, J., joined by Souter, J., concurring); *id.* at 991-992 (Stevens, J., concurring and dissenting).

The majority reserved the analytically distinct due process question whether the plaintiffs had

> "a property interest in their *claims* for payment, as distinct from the payments themselves, such that the State . . . could not finally reject their claims without affording them appropriate procedural protections. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-31 (1982)." *Sullivan*, 119 S.Ct. at 990 n.13 (emphasis added.)

As explained in the Petition for Certiorari, the Ninth Circuit made the very same error in reasoning in this case as the Third Circuit made in *Sullivan*, conflating a disputed claim for payment with a property interest in the payment itself. *See* Petition at 18. The Ninth Circuit held that the plaintiff has a property interest "aris[ing] from its public works contract; it has a property interest in being paid in full for the construction work it has completed." Petition A-17. Under California law, however, contracts for public works expressly provide that contractors are *not* entitled to be "paid in full" if workers on the project have not been paid prevailing wages, and that an awarding body shall withhold payment until a dispute about whether prevailing wages have been paid is resolved. Cal. Labor Code §§ 1727, 1774, 1775. The withholding of payment pending resolution of a dispute about whether a contract has been performed is, of course, the norm. "It is not unfair, in and of itself, . . . to withhold payment . . .

pending resolution of its amount." *Sullivan,* 119 S.Ct. at 991 (Stevens, J., concurring and dissenting).[1]

Thus, as *Sullivan* makes clear, the Ninth Circuit mischaracterized the nature of the "property" interest in this dispute. When the parties to a bilateral contract dispute whether certain sums are owed under that contract, those sums cannot fairly be said to be the "property" of either party until the dispute is resolved. The most that can be said is that the contractor has a due process property interest in its *claim* for breach of contract. *See Logan v. Zimmerman Brush Co., supra.*

2. Respondent Understates the Sweep of the Ninth Circuit's Holding that a Contractor's Right to File a Breach of Contract Lawsuit Against an Awarding Body that Withholds Disputed Amounts Purportedly Due Under a Public Works Contract is Constitutionally Inadequate.

In order to make this case appear *sui generis* and therefore unworthy of review, the Opposition relies upon

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[1] The applicable subcontracts on the public works projects at issue herein no doubt contain similar, explicit provisions allowing the withholding of payment for deficient performance. G & G has never put any of the applicable subcontracts in the record and it has pointedly refrained from contending that prime contractors were not entitled to retain payments under such contracts if the awarding bodies withheld sums from the prime contractor on account of a subcontractor's deficient performance. Indeed, the reason an awarding body enters into a single contract with just the prime contractor is to avoid having to deal separately with each of the subcontractors. Instead, the task of ensuring each subcontractor's performance is left to the prime contractor.

purported distinctions between the present case and an ordinary public contract dispute that either do not exist or were not relevant to the Ninth Circuit's decision.

First, G & G argues that the entire key to this case is that the withholding of payment on the contract is made by California's Division of Labor Standards Enforcement ("DLSE"), rather than by the body awarding the contract. But that is incorrect. Under the law, "[b]efore making payments to the contractor of money due under a contract for public work, *the awarding body* shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to a stipulation in a contract for public work. . . . " Cal. Labor Code § 1727 (emphasis added). DLSE's role is to alert the awarding body to a violation of the prevailing wage requirement and to calculate the amount due. It is, in fact, the awarding body – a party to the contract – that withholds the funds.

Second, G & G contends that the Ninth Circuit's decision turns on the fact that G & G was a subcontractor, rather than the prime contractor. But the decision itself does not support that contention. The Ninth Circuit plainly held that (1) there is a property interest in being paid under a public works contract, even if the awarding body disputes that the contract has been satisfactorily and fully performed, and (2) that the availability of an ordinary lawsuit for breach of contract after funds have been withheld is *not* sufficient to satisfy the Due Process Clause. *See* Pet. A-23, n.9 (rejecting the contention that a lawsuit for breach of contract – the remedy under Labor Code §§ 1731-1733 – would satisfy due process).

G & G does not dispute that this was the Ninth Circuit's holding. *See* Opp. Brief. at 20-25 (attempting to defend the Ninth Circuit's decision that a "lawsuit for breach of contract is not a constitutionally-adequate post-deprivation hearing.") That holding is just as applicable to contractors as it is to subcontractors and, if allowed to stand, its consequences for public contracting will be profound.

CONCLUSION

For all of the foregoing reasons, the Court should grant the petition for certiorari and either hear this case itself or vacate the decision below and remand the case for reconsideration in light of *Sullivan*.

Respectfully submitted,

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